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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HUGO CHAVEZ, Defendant and Appellant.	B233073 (Los Angeles County Super. Ct. No. PA064678)

APPEAL from a judgment of the Superior Court of Los Angeles County. David W. Stuart, Judge. Affirmed as modified.

William W. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Chung L. Mar and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Defendant and appellant Hugo Chavez was convicted by jury of making a criminal threat (Pen. Code, § 422).[1] The trial court found that he had suffered three prior prison terms within the meaning of section 667.5, subdivision (b). Appellant was sentenced to six years in state prison, consisting of the upper term of three years for the criminal threat, and one year each for the prior separate prison terms. The trial court ordered appellant to pay restitution, assessments and fees, including attorney fees in the amount of $1,000. Appellant received 236 days of presentence custody credit, consisting of 156 actual days and 78 days of conduct credit.

Appellant contends that the court erred by ordering him to pay attorney fees without holding a hearing or making any finding regarding his ability to pay as required by section 987.8. He also contends that he is entitled to an additional 78 days of presentence custody credits under postconviction amendments to section 4019.

In the interest of judicial economy we strike the fee award and modify the abstract of judgment accordingly. In all other respects the judgment is affirmed.

BACKGROUND

The facts as relevant to the issues raised are as follows: On July 24, 2008, Gustavo Flores Lomeli (Flores) was working in his mother's garage in Pacoima. He heard five gunshots and went outside to the alley to investigate. Flores saw appellant and another individual riding towards him on bicycles. Appellant was arrested by the police in connection with the shooting. Flores positively identified appellant at an infield lineup as one of the people he saw leaving the area where the shots had been fired.

On May 8, 2009, at approximately 4:30 p.m. Flores was in the alley at the back of his mother's garage. Appellant drove up in a white car that resembled a Ford Taurus and stopped in front of Flores. Appellant asked Flores "Do you remember me nine months ago?" Flores said he did not. Appellant said "You are Gustavo Flores." Flores was scared and said his name was "Juan." Appellant then said "I'm gonna kill you."

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Appellant simulated reaching for something from the seat of the car but then turned around, looked at Flores, and left.

Appellant returned an hour and a half later in the same car and made a hand gesture towards Flores who was standing in the garage talking to his neighbor, Miguel Angel Guzman Garcia (Guzman). Approximately one hour later, appellant drove by the alley a third time in the same car. Sometime during the following week, Guzman saw the white Ford Taurus parked in the alley and noted the license plate. The vehicle was registered to appellant's father.

Based on these facts, appellant was convicted of violating section 422.

DISCUSSION

I. Order to Pay Attorney Fees

At the sentencing hearing, the trial court ordered appellant to pay $1,000 in attorney fees. Appellant contends the trial court erred in imposing the fees without notice and a hearing, and a finding of an ability to pay. The People argue that by failing to object below, appellant has waived this claim on appeal and if not forfeited, the matter should be remanded for further proceedings.

Section 987.8 provides that a court may order a defendant to reimburse the county for the cost of legal representation. The trial court, at the conclusion of the trial and after notice and a hearing, must make a determination of the defendant's ability to pay all or a portion of the actual cost of his or her legal representation. (§ 987.8, subd. (b).) "'[P]roceedings to assess attorney's fees against a criminal defendant involve the taking of property, and therefore require due process of law, including notice and a hearing.'" (*People v. Smith* (2000) 81 Cal.App.4th 630, 637.)

Section 987.8, subdivision (e) provides that at the hearing the defendant must be afforded the opportunity to testify, to present witnesses and documentary evidence, and to cross-examine adverse witnesses. Moreover, subdivision (f) provides that prior to the time counsel is even appointed, "the court shall give notice to the defendant that the court may, after a hearing, make a determination of the present ability of the defendant to pay

all or a portion of the cost of counsel. The court shall also give notice that, if the court determines that the defendant has the present ability, the court shall order him or her to pay all or a part of the cost." Under the statutory scheme, there is a presumption that a defendant sentenced to prison does *not* have the ability to reimburse defense fees. This presumption may be overcome, though, by proof of unusual circumstances. (§ 987, subd. (g)(2)(B).)

That appellant did not raise this issue at the time of sentencing is of no consequence. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 [challenge to attorney fee award under § 987.8 made without a hearing on ability to pay did "not require assertion in the court below to be preserved on appeal"]; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1215 ["We do not believe that an appellate forfeiture can properly be predicated on the failure of a trial attorney to challenge an order concerning *his own fees*"].)

We agree that the trial court erred in ordering appellant to pay for his legal representation. The record does not contain any indication that appellant was given notice of the possibility he might be ordered to reimburse the cost of his legal representation before counsel was appointed. The reimbursement order was not supported by substantial evidence of appellant's ability to pay any amount, and the record shows the trial court did not conduct an on-the-record hearing to consider the issue.

Further, we conclude that remanding for a hearing on appellant's ability to pay, as the People suggest, is inappropriate given the presumption that a defendant sentenced to state prison lacks a "reasonably discernible future financial ability to reimburse the costs of his or her defense" absent a finding of "unusual circumstances." (§ 987.8, subd. (g)(2)(B); see *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537 ["express finding of unusual circumstances [required] before ordering a state prisoner to reimburse his or her attorney"].)

In the case on which the People rely, *People v. Flores* (2003) 30 Cal.4th 1059 "the People argued that a showing of unusual circumstances was conceivable because, according to the probation report, defendant possessed $1,500 worth of jewelry at the

time of sentencing." (*Id.* at p. 1068.) Here, the trial court sentenced appellant to six years in state prison. But unlike *Flores*, the People have not directed us to anything in the record that suggests the existence of unusual circumstances to rebut the presumption that appellant does not have the ability to pay attorney fees. Nor have we found any indication of unusual circumstances in our review of the record on appeal to suggest that the trial court could find unusual circumstances of the financial ability to satisfy the order of reimbursement.

The information in the record strongly points to the opposite conclusion as appellant committed this crime on the day he was paroled. His father testified that when appellant is not incarcerated he lives with his parents. There was no evidence that appellant had any source of income. Under the circumstances, we strike the attorney fee order without remand in the interest of judicial economy.

II. Equal Protection Challenge to the October 2011 Amendment to Section 4019

Appellant contends that equal protection principles require the most recent amendments to section 4019 regarding presentencing conduct credits (effective October 1, 2011) should apply to him. He contends that the date of his offense does not provide a rational basis for a lesser credit award.

A. Overview of Section 4019

Section 4019 has been amended in recent years to increase or decrease the rate at which a prisoner can earn conduct credits. This has raised the issue whether the amendments should be applied retroactively.

Prior to sentencing, a criminal defendant may earn credits while in custody to be applied to his or her sentence by performing assigned labor or for good behavior. (§ 4019, subds. (b) & (c).) Such credits are collectively referred to as "conduct credit." (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

Prior to January 25, 2010, conduct credits under section 4019 could accrue at the rate of two days for every four days of actual time served in presentence custody. (Stats. 1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)].) Effective January 25,

2010, the Legislature amended section 4019 to provide that custody credits could accrue at the rate of two days for every two days actually served, except for those defendants required to register as a sex offender, those who committed serious felonies (as defined in § 1192.7), and those who had a prior conviction for a violent or serious felony. (Stats. 2009-2010, 3d Ex. Sess., ch. 28, §§ 50, 62 [former § 4019, subds. (b), (c), & (f)].) These amendments did not state whether they were to have retroactive application.

Effective September 28, 2010, section 4019 was again amended to restore the presentence conduct credit calculation that had been in effect prior to the January 2010 amendment. (Stats. 2010, ch. 426, § 2.) By its express terms, the newly created section 4019, subdivision (g), declared the September 28, 2010 amendments applied only to prisoners confined for a crime committed on or after that date, expressly stating a legislative intent that the provision has prospective application. (Stats. 2010, ch. 426, § 2.)

Thereafter, effective October 1, 2011, the Legislature again amended section 4019 deleting conduct credit restrictions imposed on defendants with prior serious or violent felony convictions, those committed for serious felonies, and persons required to register as sex offenders. (Stats. 2011, ch. 15, § 482; Stats. 2011-2012, ch. 12, § 35.) These statutory changes reinstituted one-for-one conduct credits (i.e. two days conduct credit for every two days actually served.) (§ 4019, subds. (b) & (c).) The new statute added subdivision (h) which stated: "The changes to this section enacted by the act that added this subdivision shall apply *prospectively* and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed *on or after October 1, 2011*. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h), italics added.)

B. Statutory Construction

The California Supreme Court recently addressed whether the January 25, 2010, amendment to section 4019 should be given retroactive effect. (*People v. Brown* (2012) 54 Cal.4th 314.) In the absence of specific legislative intent to the contrary, the court reiterated the long-standing principle of statutory construction that the amendment

applies prospectively. (*Id.* at p. 318.) The court noted section 3 requires prospective-only application unless it is '"very clear from extrinsic sources'" that the amendment should apply retroactively. (*Brown, supra,* at p. 319) *Brown* found no cause to apply the January 25, 2010, amendment retroactively, and found "prisoners whose custody overlapped the statute's operative date . . . earned credit at two different rates." (*Id.* at pp. 320, 322.)

In the case of the October 1, 2011, amendment to section 4019, the Legislature did expressly state the changes were to apply prospectively and added further limitations to its application. The new increased conduct credit rate would apply only to prisoners who committed crimes on or after October 1, 2011, and any prisoner who earned days before that date would earn them at the rate required by the prior law. (§ 4019, subd. (h).) This language unambiguously conveys the Legislature's intent regarding which prisoners could earn conduct credits at the increased rate. Relying on the reasoning in *Brown,* the court in *People v. Ellis* (2012) 207 Cal.App.4th 1546 held "the amendment to Penal Code section 4019 that became operative October 1, 2011 . . . applies only to eligible prisoners whose crimes were committed on or after that date." (*Id.* at p. 1548.)

Here, appellant does not contest that the version of section 4019 under which he was sentenced provided for two days of conduct credit for every four days of actual presentence custody. He committed the current offense on May 8, 2009, and was sentenced on October 20, 2009, well before the operative date of the amended statute. Therefore, the October 1, 2011, amendment does not apply to him, and he is not entitled to retroactive application of the amendment.

C. Equal Protection Clauses of the Federal and State Constitutions

Appellant's argument that prospective-only application of the October 1, 2011, amendment of section 4019 violates the equal protection clauses of the federal and state Constitutions has been resolved by *Brown*. (*People v. Brown, supra,* 54 Cal.4th at p. 328; *People v. Ellis, supra,* 207 Cal.App.4th at pp. 1550–1552; see *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9 [declining to find equal protection violation with prospective application of Oct. 1, 2011, amendment].) The court in *Brown* explained

‘“[t]he obvious purpose [of a law increasing conduct credits]’ . . . ‘is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison.’ [Citation.] ‘[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.’” (*Brown, supra*, at p. 329, quoting *In re Strick* (1983) 148 Cal.App.3d 906, 913.) “[P]risoners who serve their pretrial detention before such a law’s effective date, and those who serve their detention thereafter, are not similarly situated with respect to the law’s purpose.” (*Lara*, *supra*, at p. 906, fn. 9.)

Thus, equal protection does not compel a retroactive application of the amendment to section 4019. We are bound by *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.

DISPOSITION

The judgment is modified to strike the order assessing attorney fees in the amount of $1,000 or any amount, and as so modified, affirmed. To the extent necessary, the trial court is directed to prepare an amended abstract of judgment reflecting this modification and forward it to the Department of Corrections and Rehabilitation.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST